

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIRSO SALCEDO,

Petitioner,

05 Civ. 3497 (JGK)

- against -

MEMORANDUM OPINION
AND ORDER

JOSEPH T. SMITH, SUPERINTENDENT,
SHAWANGUNK CORRECTIONAL FACILITY,

Respondent.

JOHN G. KOELTL, District Judge:

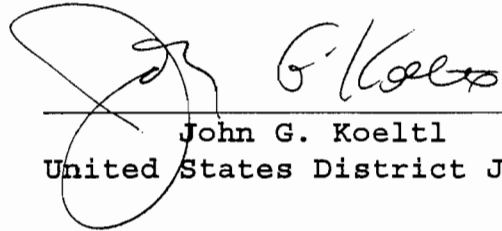
On June 13, 2006, this Court denied the petitioner's petition for a writ of habeas corpus and declined to issue a certificate of appealability pursuant to 28 U.S.C. § 2253. On June 29, 2006, the petitioner filed a notice of appeal from this Court's judgment. On July 25, 2006, the petitioner filed a motion pursuant to Federal Rule of Civil Procedure 60(b) to reconsider and reverse its prior decision on the grounds that the Court overlooked controlling authority. At that point, the Court lacked jurisdiction to grant such a motion in view of the pending appeal and had the power at most to indicate to the Court of Appeals its inclination to grant such a motion if the case were remanded to it. See Tolliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992).

The Court of Appeals has now dismissed the appeal on the grounds that the petitioner failed to make a substantial showing of the denial of a constitutional right. While the appeal is no

longer pending, the petitioner had every opportunity to explain to the Court of Appeals why this Court's decision was erroneous. Having reviewed the papers, the petitioner has failed to show that there is any basis under Federal Rule of Civil Procedure 60(b) to reverse the prior decision denying the petition. The Petitioner's motion pursuant to Rule 60(b) is therefore **denied**.

SO ORDERED.

Dated: New York, New York
May 10, 2007



John G. Koeltl
United States District Judge